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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 595

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION), PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD AND INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–14)[1] is reported at 320 F. 2d 615. The findings of fact, conclusions of law, and order of the Board (J.A. 3a–97a) are reported at 133 NLRB 1347 and 136 NLRB 1500.

[1] "J.A." references are to the Joint Appendix printed for the use of the court below; references preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

## JURISDICTION

The judgment of the court of appeals was entered on August 21, 1963 (Pet. App. B). The petition for a writ of certiorari was filed on October 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

## QUESTIONS PRESENTED

1. Whether, in view of the remand ordered by the court of appeals, the questions raised by the petition are premature.

2. If the first question is answered negatively, these further questions are reached: Whether petitioner refused to bargain in violation of the National Labor Relations Act by—

a. Insisting that the union agree to a grievance procedure which required the signature of individual employees on grievances; and

b. Withdrawing top seniority from union representatives and altering the grievance procedure after the termination date of collective bargaining agreements dealing with these subjects, without first giving the union an adequate opportunity to negotiate about the changes.

## STATUTE INVOLVED

The provisions of Section 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth on pp. 3–4 of the petition.

## STATEMENT

## I

### THE BOARD'S FINDINGS OF FACT

#### A. INTRODUCTION

This case arose out of negotiations in 1959 between petitioner and the Union [2] for new collective bargaining agreements covering units of hourly-paid and salaried employees at some of the Company's shipyards.[3] Negotiations began several weeks prior to the termination date of the existing contracts—July 31, 1959—and continued thereafter. In January 1960, the parties not having reached an agreement, the employees in both units went out on a strike; the strike was continuing at the close of the Board hearing in March 1960 (J.A. 7a; 551a, 193a).

#### B. THE PROPOSALS OF THE PARTIES

During the first three negotiating sessions, in early July 1959, the parties exchanged their respective written demands (J.A. 24a–26a; 541a–542a, 657a–841a, 103a). The Union's proposals included, *inter alia*, certain economic betterments,[4] changes in the con-

[2] Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO.

[3] Two agreements were involved, one covering hourly-paid employees and the other covering salaried employees. The parties expected that any agreement reached as to the hourly-paid employees would form the basis for negotiations as to the salaried unit (J.A. 31a; 538a–539a, 103a). The issues are virtually the same with respect to both units. Unless otherwise indicated, all references are to the bargaining for hourly-paid employees.

[4] These included changes in the contractual formula for adjusting wages to the cost of living, in premium pay, and in

tractual seniority provisions so as to increase the weight to be given seniority in determining retention rights during layoffs, and amendment of the contractual grievance clause so as to make incentive rates for new jobs subject to the arbitration procedure (J.A. 21a–23a; 110a–115a, 743a–758a, 103a). Petitioner's proposals (sometimes called the "White Book") included, *inter alia,* reduction or elimination of certain economic benefits afforded by the expiring contract,[5] changes in the seniority provisions of the contract so as to lessen the weight to be given seniority in determining an employee's right to employment during layoffs, and certain changes in the contractual grievance procedure (J.A. 12a–21a, 298a–299a, 320a, 437a–447a, 479a–487a).

Respecting the grievance procedure, petitioner sought a provision which required the Union, before it could process a grievance, to obtain the signature of the individual employee or employees involved (J.A. 17a; 810a, 729a, 130a, 169a). Moreover, its proposals restricted the permission accorded union representatives (including union stewards) to leave work to investigate grievances and to confer with the foremen about them (J.A. 16a; 446a–447a, 615a–616a, 733a–734a, 820a–821a, 266a, 178a–179a, 103a); sub-

vacation benefits; an increase in the number of paid holidays and in holiday pay; and an upward reclassification of a number of job categories.

[5] These included elimination of the provision for adjustment of wages in accordance with the cost of living (without, however, any change in the wage scale actually being paid), and diminution or elimination of certain kinds of premium pay and some employees' vacation pay.

stantially reduced the time available to the Union for appealing grievances (J.A. 16a–17a; 608a–612a, 730a–731a, 810a–816a, 103a, 442a); required the Union to submit a written statement at each step of the grievance proceeding setting out the facts upon which the grievance was based, the name of the employee aggrieved, and the name of any other employee allegedly favored in violation of the contractual agreement (J.A. 17a; 810a, 811a, 814a, 443a); and required the appeal to arbitration to be accompanied by a written statement from the Union setting out the factual basis for the complaint and the Union's position in the dispute (J.A. 17a; 816a, 731a, 103a). In addition, petitioner proposed some contract language which was designed to eliminate the existing practice of determining the merits of grievances by reference, not only to the terms of the contract itself, but to prior arbitration awards as well (J.A. 14a; 117a–118a, 122a, 138a, 209a–211a, 298a–299a, 320a, 691a, 740a–741a, 103a).

C. THE COURSE OF NEGOTIATIONS BETWEEN THE PARTIES

After exchanging proposals, the parties engaged in a number of negotiating sessions (J.A. 26a–27a; 539a–540a, 103a). Throughout the negotiations, petitioner took the position that it needed the concessions demanded by it, and could not grant the Union's proposals, because the business of its East Coast shipyards was then in decline and competition was becoming more severe (J.A. 24a–25a, 27a; 657a–689a, 120a–123a, 135a–136a, 214a–215a, 220a–221a, 223a, 231a, 298a–301a, 449a–450a, 395a–428a, 431a–435a).

The Union, in turn, rejected practically all of petitioner's proposals, contending that petitioner's business was largely noncompetitive[6] and thus that there was no substance to petitioner's claim that it needed to reduce labor costs (J.A. 27a–28a; 140a–141a, 154a–155a, 157a, 175a, 214a–215a, 271a, 294a–295a, 306a–307a, 357a–358a). The parties failed to reach agreement on any significant issue (J.A. 30a; 347a–348a, 451a).

Petitioner asserted that it sought the provision requiring employee signatures on grievances (p. 4, *supra*), so that it could "identify the employee and place the responsibility." The Union pointed out that the existing procedure accomplished this objective, for the Union always revealed the name of the employee involved (J.A. 169a, 312a). Petitioner replied, "that might be so, but this is the way the Company want[s] it" (*ibid.*). When the Union pointed out that it had the statutory right to file grievances without the employee's consent, petitioner again acknowledged "that might be so" but adhered to its proposal, stating that, if the Union had any other suggestions, it should make them (J.A. 169a, 265a, 312a–313a). The Union replied that it wanted to keep the con-

[6] Petitioner obtained a substantial amount of work on a negotiated-price basis (J.A. 108a, 141a, 155a, 390a–391a). Moreover, sometimes the government awarded petitioner contracts even though its bid had been relatively high, because of petitioner's demonstrated technical skill or its ability to meet delivery schedules, or in order to keep petitioner in operation as a going concern (J.A. 214a, 468a, 849a, 854a, 856a–858a, 185a).

tract as it was, but petitioner said that it was not interested in continuing the past practice (J.A. 169a, 265a, 313a).

The Union then pointed out that some employees might be afraid to sign a grievance form because this would "get [them] in wrong with the foreman." The Union added that it might be physically impossible for it to get the form to the employees within the limitation period set out in the grievance procedure, particularly if the grievance was based on the layoff of or failure to recall a number of employees; for in that case the employees would be available only at their own homes or they might even be outside the commuting area (J.A. 169a, 280a–281a, 313a). Petitioner answered that it "realized there would be some practical problems, but that [it] could see nothing to be gained by further discussion. The Company felt that this proposal would solve its problems" (J.A. 170a, 313a).

The discussion of the other aspects of petitioner's grievance proposal was similarly unfruitful. The Union told both petitioner and the employees that, in its view, petitioner's grievance procedure proposals were intended to, and would, destroy good industrial relations at the yards (J.A. 264a–265a, 899a–900a, 199a). The Union repeatedly insisted that petitioner was bargaining in bad faith with respect to both the grievance procedure and the other contract issues between the parties (J.A. 129a, 147a, 148a, 264a, 307a, 889a–892a).

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D. PETITIONER'S UNILATERAL ACTION AND THE ENSUING STRIKE

On July 28, 1959, petitioner orally advised the Union that if no agreement were reached by July 31, the termination date of the 1956 contracts, it would discontinue compliance with certain provisions of the contracts. These included the clauses giving top seniority to union representatives and providing for the union shop and check off clauses (all of which were provided for in both petitioner's and the Union's proposals for a new contract), and the contractual grievance and arbitration procedure (J.A. 34a; 145a–146a). On August 1, no agreement having been reached, petitioner ceased giving effect to those provisions (J.A. 34a–35a; 543a–544a, 178a–180a, 305a, 310a–312a, 103a). On that date, petitioner laid off a number of union stewards without according them top seniority, and refused to accept new grievances which the Union sought to file under the former contractual procedure (J.A. 279a–281a, 543a–544a, 103a).

On August 11, 1959, petitioner announced to the Union and to the employees that it was putting into effect most of its proposals with respect to the hourly-paid unit (but not the salaried unit), but not the arbitration clause in its proposed grievance procedure, the provision calling for top seniority for union representatives, and the union shop and checkoff clauses (J.A. 32a–37a; 545a–546a, 843a–847a, 160a, 103a). Petitioner put the new conditions into effect two days later, on August 13 (J.A. 36a–37a; 545a–547a, 103a, 153a–154a, 180a–185a).

In January 1960, the parties still not having reached an agreement, both the hourly-paid and the salaried

employees went out on strike at all of the yards where the employees were represented by the Union (J.A. 7a; 551a, 103a).

## II

### THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by insisting on a provision which required the signature of individual employees on grievances, and by unilaterally abandoning, on August 1, 1959, the provisions of the 1956 contracts with respect to the grievance procedure and top seniority for union representatives (J.A. 88a, n. 2, 91a–92a).[7] However, the Board found that petitioner did not violate the Act by discontinuing the union-shop and checkoff provisions of the 1956 contracts after their termination dates, and by unilaterally putting its contract proposal with respect to the hourly-paid employees in effect on August 13, 1959 (J.A. 90a–91a, 89a). In making the latter finding, the Board adopted without comment the Trial Examiner's conclusion that the Union's "adamant" opposition to petitioner's proposals, and the parties' failure to agree on any material issue after a number of bargaining sessions, established that they had reached an "absolute impasse" (J.A. 55a–57a). The Board dismissed the complaint insofar as it alleged that petitioner had not bargained in good faith. The Board found that, although "several particular aspects of [petitioner's] behavior were

[7] One Member dissented with respect to the second finding (J.A. 95a).

unlawful, considering the totality of [petitioner's] conduct we are unable to conclude that [petitioner] did not honestly endeavor to reach an agreement" (J.A. 88a–89a).

The Board's order (J.A. 93a–97a) directs petitioner to cease and desist from the unfair labor practices found, and in any like or related manner from interfering with its employees in the exercise of their statutory rights. Affirmatively, it requires petitioner to bargain with the Union on request, and to post appropriate notices.

## III

### THE COURT OF APPEALS DECISION

The Company and the Union each sought review of the portions of the Board's order adverse to it.

The court of appeals agreed with the Board that petitioner violated Section 8(a)(5) of the Act by insisting on its grievance signature proposal and by unilaterally abandoning the provisions of the 1956 contracts governing the grievance procedure and providing top seniority for union representatives (Pet. App. 5–11).[8] The court held, however, that the Board had not given an adequate rationale for its conclusion that petitioner did not violate the Act by unilaterally putting into effect on August 13, 1959, its contract proposals with respect to the hourly-paid employees. The court pointed out that the only reason given by the Board for concluding that an impasse existed was

[8] The court also agreed with the Board that petitioner did not violate the Act by suspending enforcement of the union-shop and checkoff clauses of the 1956 contracts after those contracts terminated (Pet. App. 8–9).

that the Union had adopted an inflexible bargaining position (Pet. App. 12). The court stated that the Union's position should have been evaluated in the light of petitioner's prior unfair labor practices; and that the Board, in assessing whether an impasse existed which was legally sufficient to justify unilateral action, should have considered the effect of the petitioner's unfair labor practices upon the Union's bargaining position (Pet. App. 13–14). The court therefore found it unnecessary to consider the Union's alternative argument that the Board erred in failing to find petitioner guilty of subjective bad faith bargaining during the entire course of the 1959 negotiations (Pet. App. 11).

The court remanded the case to the Board "for further consideration in the light of this opinion" and for "the issuance of an order which will effectuate the policies of the Act" (Pet. App. 14).

## ARGUMENT

The petition is premature. The questions which it raises may either be rendered academic or be presented in a different posture after the Board has reconsidered the case on the remand* and its action has been reviewed by the court of appeals. In any event, the decision of the court of appeals is correct.

1. Contrary to petitioner (Pet. 20), the court below in directing the remand did not hold that petitioner violated the Act by unilaterally putting its contract proposals into effect on August 13, 1959. The court found that the Board had determined the unilateral

* The Board has decided to accept the remand.

action to be proper solely on the ground that it occurred after there had been an impasse in the bargaining and without considering whether the impasse was caused by petitioner's prior unfair labor practices; the court has merely directed the Board to consider the latter question.[10] On such consideration, the Board may find that the prior unfair labor practices contributed to the impasse, or it may find that they did not. If the Board makes the latter finding, it could reaffirm its earlier holding that petitioner's action in unilaterally putting into effect its contract proposals was not unlawful. If this holding were then sustained by the court of appeals, the third question raised by the petition—whether petitioner violated the Act by unilaterally putting its proposals into effect (Pet. 3)—would become academic. That question would be presented only if the Board were to find that the prior unfair labor practices did contribute to the impasse, or if the court of appeals were to reverse a contrary Board finding.

Moreover, the predicate for the other unfair labor practice findings may be altered as a result of the remand and the subsequent review by the court of appeals. The Board found, and the court below agreed, that petitioner's insistence on the grievance-signature proposal and its action in unilaterally

[10] It is well settled that an impasse caused by the employer's unfair labor practice affords no justification for his taking unilateral action. See *National Labor Relations Board* v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529–530 (C.A. 9); *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (C.A. 5).

discontinuing the former grievance procedure and super-seniority for union representatives constituted refusals to bargain, in violation of Section 8(a)(5) of the Act, even though petitioner had manifested good faith in the bargaining negotiations. The court did not reach the Union's contention that petitioner had not negotiated in good faith. If the Board were now to find that petitioner's unilateral action on August 13 constituted a further refusal to bargain, this might lead it to reevaluate, and perhaps to change, its view respecting petitioner's general good faith. Or, even if the Board were to adhere to its original position on that question, the court of appeals might decline to sustain the Board's good-faith finding.

Should the Board or the court of appeals find that the negotiations were not in fact conducted in good faith, it would follow that the totality of petitioner's conduct at the bargaining table was violative of the Act, and it would be unnecessary for this Court to consider whether part of that conduct—*i.e.*, demanding employee signatures on grievances, and discontinuing the grievance procedure and superseniority for union representatives—would be unlawful by itself, and irrespective of petitioner's good faith.

On the other hand, were the Board to adhere to its view that there was general good faith in the negotiations, and were the court of appeals to sustain that finding, petitioner would then have full opportunity to seek review here of the question whether those actions, standing alone, constitute an unlawful refusal to bargain.

2. Even if the case were ripe for review, we submit that the petition should be denied.

(a) Petitioner attacks on two grounds the finding that its action on August 1, 1959, in discontinuing superseniority for union representatives and the former grievance procedure was unlawful: (i) its action did not amount to a unilateral setting of conditions of employment, but merely constituted a form of temporary economic pressure designed to force the Union to accede to petitioner's contract demands; and (ii) the action was not taken unilaterally since the Union was given an adequate opportunity for discussion (Pet. 16–19). There is no substance to either of these contentions.

(i) As the court below properly observed (Pet. App. 11), regardless "of how characterized, the changes altered conditions of employment." To alter those conditions even temporarily, without first notifying and discussing the matter with the bargaining representative, violates Section 8(a)(5) of the Act. For, it "does amount to a refusal to negotiate about the affected conditions of employment" at least for the period while the changes are operative, "and must of necessity obstruct [further] bargaining." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747. This conclusion is entirely consistent with *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477. As *Katz* recognized (369 U.S. at 747), the partial strike tactics in *Insurance Agents*, unlike the unilateral changes here and in *Katz*, "had not in

any way whatever foreclosed discussion of any issue, by unilateral actions or otherwise." [11]

(ii) Petitioner's contention that it gave the Union notice of the proposed changes and an opportunity to bargain about them is refuted by the record. As the court below pointed out (Pet. App. 10): "But the employer concedes that it was not until July 28 that the union was notified that these changes were to be effected only three days later. Until that time the company's own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *NLRB* v. *Katz* * * *."

(b) The holding of the Board, affirmed by the court below, that petitioner violated the Act by insisting that grievances be signed by the individual employees presents a more substantial question. The Act requires the employer and the employees' representative to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment"; within that area neither party is legally obligated to yield. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. On the other hand, the Court held in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, that there is a class of lawful bargaining subjects which fall outside the area of

[11] Petitioner's contention that the changes were merely intended as economic pressure on the Union is inconsistent with its disavowal of any "threat" when it first advised the Union of its intention to effect the changes in question (see J.A. 146a).

"wages, hours, and other terms and conditions of employment"; that the parties may bargain about these subjects if they choose; but, that if the parties are unable to agree on them, the disagreement cannot lawfully be made the basis for refusing to enter into a contract covering subjects within the area of mandatory bargaining. The reasoning in *Borg-Warner* has been criticized,[12] but the Court's holding is plain. The Board, which believes the reasoning to be sound, and the court below were plainly entitled to follow it.

The *Borg-Warner* case is therefore decisive if petitioner's proposal that the Union be barred from presenting grievances not signed by individual employees fell outside the area of compulsory bargaining. The Board and court below so held, but the question is debatable. Since a grievance procedure is a method of resolving questions relating to terms and conditions of employment and thus is clearly within the area of mandatory bargaining, it can fairly be argued that the subject is not removed from that area merely because the employer seeks to condition the use of the grievance procedure on obtaining the signature of the employee affected; for, like time limits on the filing and processing of grievances, this is a means of keeping the procedure from being abused (see Pet. 12). Moreover, a requirement that the employee sign the

[12] See, *e.g.*, Cox, *Labor Decisions of the Supreme Court at the October Term 1957*, 44 Va. L. Rev. 1057 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 Va. L. Rev. 988, 993–1006 (1961); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 N.Y.U. Conf. Lab. 39, 49–50 (1959).

grievance or similar restrictions on the filing of grievances, is found in many collective bargaining contracts.[13] Not every contractual restriction upon the statutory powers of the bargaining representative is outside the area of permissible insistence. *E.g., National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. Nevertheless, the Board finds the contrary arguments more persuasive. Any contractual requirement that a grievance be signed by an employe before it can be processed by the union, like the strike-vote proposal in *Borg-Warner*, has the effect of "weakening the independence of the 'representative' chosen by the employees" (356 U.S. at 350). As the court below pointed out (Pet. App. 7–8), it "would preclude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer reprisals, or for similar reasons, chose not to sign."[14] Moreover, it

[13] See J.A. 926a–985a; but cf. J.A. 1008a–1055a. See also *North American Aviation, Inc.*, 16 L.A. 744.

However, non-mandatory subjects may lawfully be included in collective bargaining contracts if the parties agree to them. See *Borg-Warner*, 356 U.S. at 359, dissenting opinion. Hence, the fact that a clause is in a contract does not necessarily establish that it could properly have been insisted upon had one of the parties opposed its inclusion.

[14] There are many provisions of a collective bargaining agreement, like union security and checkoff, which are primarily for the benefit of the union rather than the employee. It may be that an employee would not be interested in challenging breaches of those provisions, or it may be difficult to obtain the consent of every employee who would be affected thereby. Petitioner's proposal, however, required that the grievance be "signed by each Employee involved" (J.A. 810a), and petitioner explained that this meant that: "No grievance will be accepted in

detracts from the full recognition to which the bargaining agent is entitled, for in effect the agent would be required continually to prove its authority to represent and bargain for the employees (see J.A. 52a). Consequently, the Board submits that the grievance-signature proposal, no less than the strike-vote proposal in *Borg-Warner*, was outside the area of mandatory bargaining.

Petitioner's further contention that the record fails to show that it insisted upon its grievance-signature proposal as a condition of reaching an agreement (Pet. 14), presents only an evidentiary issue, which does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the facts summarized in the Statement (pp. 5–7), show that petitioner made it clear that, notwithstanding the Union's contrary arguments, the grievance-signature proposal was something that the Company had to have, and it never retreated from that position; indeed, it put that proposal into effect when the prior contracts expired (p. 8, *supra*). In these circumstances, the Board was fully justified in finding that petitioner insisted on the grievance-signature clause as a condition of reaching an agreement and that such insistence was at least one cause of the impasse which resulted (J.A. 50a–51a, 62a). See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 907 (C.A. 6), modified in other respects, 356 U.S. 342.

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Step No. 1 unless it * * * is signed by the aggrieved employee or employees. General statements covering any and every employee are out" (J.A. 729a).

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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